Supreme Court, U.S.
FILED
APR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1549

In The
Supreme Court of the United States
October Term, 1987

JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS,

Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Patrick L. Smith
John B. Carter
Daniel F. Decker
Confederated Salish and Kootenai Tribes
Legal Department
P.O. Box 278
Pablo, Montana 59855
(406) 675-2700

James H. Goetz
GOETZ, MADDEN & DUNN, P.C.
35 North Grand
Bozeman, Montana 59715
(406) 587-0618

Attorneys for Respondents

April 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

54 pp

QUESTION PRESENTED

Whether the appeals court determination that the district court may not ignore differences in seniority of water rights claims on the Flathead Indian Reservation, when it undertakes to provide interim prospective guidance to the Bureau of Indian Affairs in an emergency water rights controversy, conflicts with federal policy embodied in the McCarran Amendment or violates any due process of irrigators when: (1) there is no permanent quantification of any water right, (2) there is no court of appeals mandate for such quantification, and (3) the state's adjudication of tribal water rights on the Reservation is statutorily suspended pending ongoing efforts to negotiate a state-tribal water right compact.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

TREATIES AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS CORRECT AND PRESENTS NO ISSUE OF GENERAL IMPORTANCE WARRANTING REVIEW BY THE COURT, NOR DOES IT CONFLICT WITH ANY CIRCUIT COURT DECISION 14

CONCLUSION 23

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

TABLE OF CASES:

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983) 5, 10

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 10

Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project, 616 F. Supp. 1292 (D. Mont. 1985) 7

Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 429 U.S. 929 (1982) 3, 12, 16

Confederated Salish and Kootenai Tribes v. United States, 437 F.2d 458, 197 Ct. Cl. 801 (1971) 3

General Agriculture Corp. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975) 15

Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (9th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979) 14

Joint Board of Control v. United States, 646 F. Supp. 410 (D. Mont. 1986), *rev'd*, 832 F.2d 1127 (9th Cir. 1987), petition for writ of certiorari pending 6, 9, 11, 17

Joint Board of Control v. United States, No. CV-87-107-M (D. Mont. 1987), *appeal filed on August 12, 1987*, CA No. 87-4106 (9th Cir.) 10

Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985) 11, 14

Montana v. Confederated Salish and Kootenai Tribes, — Mont. —, 712 P.2d 754 (1985) 6, 16

Morris v. Bean, 146 F. 423 (C. C.D. Mont. 1906) 15, 21

TABLE OF AUTHORITIES--Continued

Page

Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187 (9th Cir. 1983) 6

Oregon v. United States, 467 U.S. 1252 (1984) 14

Pennell et al. v. City of San Jose et al., — U.S. —, 56 U.S.L.W. 4168 (February 24, 1988) 22

State v. McClure, 127 Mont. 534, 268 P.2d 624 (1954) 3, 16

United States v. Adair, 732 F.2d 1394 (9th Cir. 1983), cert. den. sub. nom. *Oregon v. United States*, 467 U.S. 1252 (1984) 14, 16

United States v. Alexander, 131 F.2d 359 (9th Cir. 1942) 15

United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) 15

United States v. Powers, 305 U.S. 527 (1939) 12, 15

United States v. Wheeler, 435 U.S. 313 (1978) 3

United States v. Winans, 198 U.S. 371 (1905) 3, 16

Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) 3

Winters v. United States, 207 U.S. 564 (1908) 4, 15

OTHER AUTHORITY:

CODE OF FEDERAL REGULATIONS

25 C.F.R. Part 171 ..... 2, 19

MONTANA CODE ANNOTATED (1987)

§ 85-2-217 ..... 2, 6, 18

§§ 85-2-201 to 85-2-243 5

§§ 85-2-701 to 85-2-705 ..... 2, 6, 7, 18

TABLE OF AUTHORITIES—Continued

Page

UNITED STATES CODE

25 U.S.C. § 381 (Dawes Act) 2, 11, 13, 14, 15

28 U.S.C. § 1254(1) 2

30 U.S.C. § 1201 22

43 U.S.C. § 666 (McCarran Amendment) 2, 5, 17

STATUTES

Act of February 8, 1887, 24 Stat. 390 (General Allotment Act or Dawes Act) 11

Act of April 23, 1904, 33 Stat. 302 (Flathead Allotment Act) 4

Act of May 29, 1908, 35 Stat. 444 4

Treaty of Hellgate of July 16, 1855, 12 Stat. 975 ..... 3, 4

3 Kapp 655 4

No. 87-1549

In The
Supreme Court of the United States
October Term, 1987

JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS,

Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The November 17, 1987 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 832 F.2d 1127 (9th Cir. 1987) and is reprinted in the Appendix to the Petition for Certiorari at A-62 through A-70. The prior opinion of the United States District Court for the District of Montana is reported at

646 F. Supp. 410 (D. Mont. 1986) and is reprinted in the same Appendix at A-33 through A-61.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1987. On January 29, 1988, Justice O'Connor entered an order extending time for the filing of this Petition to and including March 16, 1988. The Confederated Salish and Kootenai Tribes were served on March 21, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

The Treaty with the Flatheads, Kootenays and Upper Pend d'Oreilles of July 16, 1855, 12 Stat. 975 (hereafter "Treaty of Hellgate"), and 25 U.S.C. § 381 are reproduced in the Appendix hereto. The McCarran Amendment, 43 U.S.C. § 666, is reproduced in the Petitioner's Appendix. Section 171.6(a) of Title 25 of the Code of Federal Regulations is reproduced in the Appendix hereto.

The following provisions of the Montana Water Use Act are also reproduced in the Appendix hereto: §§ 85-2-701 to 85-2-705 and § 85-2-217.

STATEMENT OF THE CASE

Since time immemorial the Salish and Kootenai Tribes have held aboriginal title to a vast area of land located in what now comprises the states of Montana and Idaho.[1] This vast aboriginal homeland includes the present Flathead Indian Reservation which "was a natural paradise for hunting and fishing."[2] The Tribes "had always exercised their right to hunt and fish thereon from time immemorial"; it was their ancestral home.[3]

The Flathead Indian Reservation, comprising approximately 1,245,000 acres in northwestern Montana, was reserved by the Tribes in the Treaty of Hellgate, July 16, 1855.[4] In return for rights reserved in the treaty, the Tribes agreed to convey substantial portions of their aboriginal homelands to the United States.

---

1 *The Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458, 460, 197 Ct. Cl. 801 (1971). These tribes are now known as the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("Tribes").

2 *Id.* 437 F.2d at 478, 197 Ct. Cl. at 837.

3 *State v. McClure*, 127 Mont. 534, 268 P.2d 624, 632 (1954). See also *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982), *cert. denied*, 429 U.S. 929 (1982) (the Kootenai Indians depended heavily on fishing).

4 Ratified by the United States Senate on March 8, 1859, 12 Stat. 975, reprinted in the Appendix to this brief at 1 to 9. See *United States v. Winans*, 198 U.S. 371, 381 (1905) ("The treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."). Accord *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979); *United States v. Wheeler*, 435 U.S. 313, 327 n. 24 (1978).

In Article III of the treaty, the Tribes expressly reserved and the United States guaranteed that:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians. . . .

12 Stat. 975 (App. 4) By implication the treaty reserved to the Tribes the exclusive and paramount right to all waters necessary and convenient to uses reasonably related to the purpose for which the Reservation was established.[5]

Congress provided in 1904 that Reservation lands were to be allotted to Indians and that certain surplus lands were to be opened to non-Indian settlement pursuant to the Flathead Allotment Act.[6] The 1904 Act also authorized the expenditure of tribal funds derived from the proceeds of the sale of tribal lands for the construction of irrigation works (and for other purposes) to benefit the Indians.[7] The Flathead Indian Irrigation Project ("FIIP" or "Project"), which is administered by the Bureau of Indian Affairs ("BIA"), presently serves both Indian and non-Indian irrigators.[8] The FIIP operates

---

5 See *Winters v. United States*, 207 U.S. 564 (1908), and note 25, *infra*.

6 Act of April 23, 1904, 33 Stat. 302 (reprinted in Petitioner's Appendix at A-3 to A-8) (hereafter referred to as "Pet. App."). By Presidential proclamation the Reservation was opened to non-Indian settlement in 1910, rather than 1909 as alleged by Petitioner. *See* 3 Kapp 655.

7 Act of April 23, 1904, § 14, 33 Stat. 305 (Pet. App. A-7).

8 The Act of May 29, 1908, 35 Stat. 444 (Pet. App. A-9 to A-12), amended the Flathead Allotment Act to provide, *inter*

(Continued on following page)

and maintains approximately 1,200 miles of canals and ditches and 16 reservoirs for irrigation purposes.[9] These facilities, mostly built on tribal and allotted Indian lands, have been constructed in such a manner as to be inextricably intertwined with dozens of previously existing natural streams and lakes within the boundaries of the Reservation. The operation of the FIIP system directly impacts the ability of Reservation fisheries to survive and has the ability to dewater crucial reaches of Reservation streams.[10]

Montana has been engaged in a general adjudication of water rights since 1979. *See generally* §§ 85-2-201 to 85-2-243 MCA (1987). The State of Montana applies its water adjudication procedures to the waters of Indian reservations, including the Flathead, by virtue of the McCarran Amendment (43 U.S.C. § 666) and this Court's holding in *Arizona v. San Carlos Tribe of Arizona*, 463

(Continued from previous page)

alia, for non-Indians to share in the benefit of the irrigation project authorized in 1904. Even after non-Indians were allowed to participate in the irrigation project it is clear that Congress intended the main beneficiaries to be the Indian allottees. The legislative history of the 1908 amendment to the Flathead Allotment Act states: "That in all probability three-fourths of the irrigable land would be allotted to Indians." S. Rep. 1198, 60th Cong., 1st Sess. 2 (1908).

9 *Comprehensive Review Report, Flathead Indian Irrigation Project* (1985), at 1-32, 8-3 (Def. Ex. 3). This report was prepared at the direction of the Secretary of the Interior.

10 *See generally* Comprehensive Review Report, *supra*, and note 15, *infra*.

U.S. 545 (1983) *(San Carlos)*.[11] However the Montana Water Use Act provides that the State, through its Reserved Water Rights Compact Commission, may negotiate compacts with federal agencies and with Indian tribes; the process of water adjudication is suspended pending such negotiations. *See* §§ 85-2-701 to 85-2-705 and § 85-2-217 MCA (1987) (App. 12-15). Because the Tribes have been engaged in such negotiations with the State at all times pertinent to this case, the adjudication of water rights on the Flathead Reservation has been suspended by operation of state law. In 1986, at the time this case was pending before the federal district court, it was anticipated that the adjudication of water rights on the Flathead Reservation would not occur until at least 1990. *Joint Board of Control v. United States*, 832 F.2d 1127, 1130 (9th Cir. 1987) (Pet. App. A-66). Recognizing that the compact negotiations could not be completed by 1990, the Montana Legislature, in 1987, extended the completion date for compact negotiations to July 1, 1993.[12] If the Tribes are unsuccessful in negotiating a compact with the State, they must file their claims to reserved

---

[11] See *Northern Cheyenne Tribe v. Adsit*, 721 F.2d 1187 (9th Cir. 1983) (Upon remand under *San Carlos*, the Ninth Circuit instructed the Montana federal district courts to stay, rather than dismiss, several pending federal water adjudication lawsuits). In *State of Montana v. Confederated Salish and Kootenai Tribes*, — Mont. —, 712 P.2d 754 (1985), the Montana Supreme Court held that the disclaimer provision found in Montana's Constitution is not a bar to state adjudication of Indian and federal water rights and that the Montana Water Use Act is facially adequate to adjudicate such rights.

[12] That statute provides: "This suspension shall be effective until July 1, 1993 as long as negotiations are continuing or ratification of a completed compact is being sought." § 85-2-217 MCA (1987).

waters within six months, and the adjudication would then commence. *See* § 85-2-702(3) MCA (App. 14).

In July 1985, the Reservation faced a serious drought.[13] The federal manager of the Project, the BIA, ignored the Tribes' request to maintain emergency stream flows and pool levels to protect a core fishery. The Tribes then requested injunctive relief from the federal district court. The Petitioner, the Flathead Joint Board of Control ("Joint Board"), intervened as a defendant and contested the Tribes' request for emergency flows and pools.[14] On August 1, 1985 the district court granted a temporary restraining order requiring emergency in-stream flows to protect tribal fisheries from complete dewatering. Prior to that order, FIIP had routinely dewatered streams.[15]

---

[13] *Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project*, 616 F. Supp. 1292, 1294, 1298 (D. Mont. 1985). Water availability in the streams was a much more serious problem in 1985, as compared with 1986, because of lack of crucial precipitation in the period April through July, 1985. In 1986, precipitation during those months exceeded the long term average (1951-1980). Affidavit of Kenn A. Cartier, tribal hydrologist (Court Record 33) (hereafter court records are referred to as "CR").

[14] *Id.* at 1294.

[15] For example, Thomas Bateridge, the Tribes' hydrologist, introduced unrefuted evidence consisting of stream gauge data and photography showing that the Jocko River has been historically completely dewatered below the massive Jocko "K" diversion during portions of the irrigation season. Tr., Vol. 3, at 124-125, 135 (App. 22-24). In every year since gauges were installed (1982 through 1985), these gauges showed no flow in the Jocko River during portions of the irrigation season. *Id.* at 135 (App. 24). The Jocko River is considered to contain the most important trout

(Continued on following page)

Shortly after the issuance of the 1985 restraining order, the Tribes and the BIA entered into a stipulation that required certain minimum flows to be maintained until October 31, 1985 (i.e., after the end of the irrigation season) to preserve a "core fishery" and the suit was dismissed. *See* 616 F. Supp. at 1294-95. In that stipulation the government acknowledged the "Tribes' aboriginal rights, as reserved by the Tribes in the Treaty of Hellgate of 1855. . . ." (Plain. Ex. 1(A)).

Mindful of the 1985 litigation, the BIA determined it would develop an interim instream flow operational strategy for the 1986 irrigation season based on a biologically-sound methodology.[16] After extensive examination

---

(Continued from previous page)

fishery within the Reservation, albeit beleaguered by the FIIP. *See* Affidavit of Paul David Cross, at 6 (CR 15). The Petitioner asserts that the Project's hydrologic technician concluded that the "historical flow" below the Jocko "K" Diversion was approximately 10 cubic feet per second (cfs) (The Petitioner incorrectly referred to William L. Slack, the Project's hydrologic technician, as a hydrologist. *See* Tr., Vol. 1, at 98), but neglects to mention that this technician admitted under cross-examination that the 10 cfs "historical flow" is, in reality, the water that leaks through the cracks of the diversion structure and that, prior to the 1985 restraining order, the Project never intentionally released any water below the diversion, notwithstanding its knowledge that this resulted in dewatering the river for a few miles. Testimony of William L. Slack, Tr., Vol. 1, at 149-150 (App. 17-18).

16 Given financial and time constraints and the approaching 1986 irrigation season, the BIA opted for the application of the "wetted perimeter" instream flow methodology. The Joint Board's fishery biologist conceded that the decision to utilize this methodology was reasonable under the circumstances. (Tr., Vol. 2, at 115-116) (App. 19-20)

of fisheries data, in late July 1986[17] the BIA began to implement its interim instream flow and reservoir pool level plan at the Project.[18] That plan provided a modicum of protection for the tribal fishery for the remainder of the 1986 irrigation season. The 1986 plan was explicit that it was a short-term operational strategy (effective only for a portion of the 1986 irrigation season) and not a permanent general stream adjudication or quantification of water rights:

> The [plan] does not purport, nor shall it be interpreted to settle or reflect existing uses or claims to the water rights made or to be made by the Tribes, FIIP or any person, entity, or governmental agency within the Flathead Reservation. [It] is a temporary measure intended to avoid conflicts between competing interests during the 1986 irrigation season. It shall not be interpreted as a final precedential determination of instream flow or reservoir pool levels adequate to maintain and preserve Flathead Reservation fisheries resources.

Ex. 1 to Complaint (CR 1).

---

[17] The directive to implement the plan was received by Project personnel on July 17, 1986. *Joint Board of Control v. United States*, 646 F. Supp. 410, 423 (D. Mont. 1986), *rev'd*, 832 F.2d 1127 (9th Cir. 1987). The plan was implemented on or about July 26, 1986 (Complaint at 7; CR 1) and, under the terms of the plan, it would expire on October 31, 1986. 646 F. Supp. at 419.

[18] Contrary to the Petitioner's assertion (Pet. 5-7), the 1986 interim instream flow and pool level "agreement" was not an agreement at all. The "agreement" never received the approval of either the Tribes or the Joint Board of Control. Nevertheless, it was the strategy by which the BIA operated the Project during the 1986 irrigation season until enjoined. 832 F.2d at 1129, n. 1 (Pet. App. A-64)

Ignoring this explicit qualification, the Joint Board elected to invoke federal court jurisdiction and filed suit to enjoin the plan, charging that a *de facto* adjudication had been undertaken.[19] On August 6, 1986 the district court granted a temporary restraining order prohibiting the FIIP from implementing the plan. After a hearing in late August 1986, the district court entered its order granting the preliminary injunction on October 16, 1986, after the irrigation season had ended. The district court's opinion indicated that this was a conflict capable of repetition yet evading review and undertook to provide prospective legal guidance to the parties. 646 F. Supp. at 420 (Pet. App. A-47, A-60). The district court said it exercised its jurisdiction in the recognition that it would be years before the Montana water adjudication reached the Flathead Reservation and that emergency controveries need to be resolved. *Id.* at 415 (Pet. App. A-37, A-38). This exercise of jurisdiction was approved by the Ninth Circuit, which stated:

> There is a clear federal policy to permit general water rights and adjudications to be performed in state courts. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Federal actions brought for the purpose of determining water rights will generally be dismissed in favor of concurrent state court proceedings. See, e.g., *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). At the time of the district court's decision, the State of Montana was in the process of

---

[19] In 1987, the Joint Board again invoked the jurisdiction of the same court in its unsuccessful attempt to enjoin the BIA's 1987 operational strategy for this irrigation project. *Joint Board of Control v. United States*, No. CV-87-107-M (D. Mont. 1987), *appeal filed*, CA No. 87-4106 (9th Cir.).

> determining water rights within the state [footnote notation omitted], an undertaking expected to consume many years.
>
> In the meantime, however, controversies like the present one arise and must be decided. See *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032, 106 S. Ct. 593, 88 L.Ed.2d 573 (1985). The district court recognized that fact in ruling that it would not defer decision in favor of a state water rights adjudication that might not reach the Flathead Reservation until 1990. *Joint Board*, 646 F. Supp. at 414-415.

832 F.2d at 1130-31 (Pet. App. A-66).

The district court's opinion took care to state that it was not engaging in an adjudication of the water rights of any party on the Reservation, but rather was providing interim guidance to the exercise of discretion of a federal agency. 646 F. Supp. at 417-18 (Pet. App. A-43, A-44).

While it undertook no quantification of water rights, the district court's attempt to provide substantive prospective legal guidance extended well beyond that necessary to resolve the interim dispute. The opinion announced a rule for the allocation of "all waters of the Reservation" (whether or not affected by FIIP operations). 646 F. Supp. at 426 (Pet. App. A-60). The district court based this rule upon the "just and equal distribution" standard found in the Dawes act[20]—a standard which applies only to water distribution "among the Indians" and their successors in interest, i.e., to irrigation waters which are

---

[20] Also known as the General Allotment Act. See Act of February 8, 1887, Ch. 119, § 7, 24 Stat. 390, *codified at* 25 U.S.C. § 381.

equal in seniority. *United States v. Powers*, 305 U.S. 527, 533 (1939), discussed *infra* at 15. Although the district court disclaimed any intent to determine the relative priorities of the parties' water rights, the priority question was addressed by the district court in its determination that the "just and equal distribution" standard of the Dawes Act applied to all Reservation waters, including the Tribes' treaty-reserved fishing water right, regardless of relevant priority dates.

It was this far-reaching prospective effect of the district court ruling which compelled the Tribes to appeal. The Ninth Circuit's unanimous opinion squarely reversed the district court's erroneous application of the "just and equal distribution" standard to all waters of the Reservation finding that: "Once a court takes jurisdiction to resolve a water right dispute it has a solemn obligation to follow federal laws that govern Indian water rights. *San Carlos Apache Tribe*, 463 U.S. at 371. . . ." 832 F.2d at 1131 (Pet. App. A-68). The court of appeals said:

> The Tribes in this case contended that they had exercised aboriginal fishing rights over the territory and waters in issue. The district court did not permit the Tribes to make a record on that point. Yet their claim is clearly a colorable one: we have stated elsewhere that one of the Tribes was heavily dependent on fishing the area when the Treaty of Hell Gate was signed. *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982).
>
> * * *
>
> It was error . . . for the district court to hold that water claimed under potentially prior tribal fishing

> rights must be shared with junior appropriators, and that the requirement of equitable sharing could be imposed without addressing the Tribes' claim of aboriginal fishing water rights.

832 F.2d at 1131 (Pet. App. A-68).

It is significant that the Petitioner does not submit for review the principal holding of the Ninth Circuit regarding the misapplication of the Dawes Act, thus conceding it is correct. Instead the Petitioner shifts ground by arguing that the Ninth Circuit has incorrectly mandated the district court to adjudicate both the priority and quantification of water rights on the Reservation.[21] The Ninth Circuit opinion plainly does not mandate any permanent quantification. With respect to the priority question, the court of appeals decision holds that an aboriginal rights claim cannot be ignored or relegated to junior status. *See* note 25, *infra*. Thus, the court of appeals reversed a concededly improper application of the Dawes Act and remanded for routine implementation. Accordingly, as discussed below, no important question is presented for review and certiorari should be denied.

———o———

---

[21] Pet. at i (Questions Presented). The two questions presented to the Court by the Petitioner are mutually exclusive interpretations of the court of appeals opinion. The first question states that the appeals court has directed *the district court* to quantify the Tribes' aboriginal water right; the second question states that the appeals court has mandated *the BIA* to administratively quantify the same right.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS CORRECT AND PRESENTS NO ISSUE OF GENERAL IMPORTANCE WARRANTING REVIEW BY THE COURT, NOR DOES IT CONFLICT WITH ANY CIRCUIT COURT DECISION.

The court of appeal's opinion does not conflict with the opinion of this Court or any other circuit court. When presented with the question, this Court has found no occasion to review a lower federal court's determination to provide a federal forum to resolve interim water disputes involving federal agency administration of Indian reserved waters which do not involve a general stream adjudication.[22]

The Petitioner does not appeal the central holding of the court of appeals, thereby conceding that the court of appeals was correct in reversing the district court's erroneous attempt to apply the Dawes Act's "just and equal distribution" standard to all Reservation waters. The Ninth Circuit correctly held that this Dawes Act standard does not apply to an Indian tribe's aboriginal

---

[22] See *Kittitas Irrigation District v. Sunnyside Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985) (allowing release of instream flow below an irrigation structure to maintain salmon eggs subject to treaty fishing rights); *United States v. Adair*, 732 F.2d 1394 (9th Cir. 1983), *cert. den. sub. nom. Oregon v. United States*, 467 U.S. 1252 (1984) (allowing the federal district court to declare an aboriginal priority date for the Klamath Tribes' fishery-based water right); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1135 (9th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979) (federal district court is proper forum to entertain an Indian tribe's complaint seeking to enjoin Secretary of Interior's diversion of waters).

right to sufficient stream flow to support treaty-reserved fisheries. 832 F.2d at 1132 (Pet. App. A-69). Its holding adheres to this Court's opinion in *United States v. Powers*, 305 U.S. 527, 533 (1939), which makes clear that the Dawes Act's "just and equal distribution" of waters applies only when a shortage of water occurs among Indian allottees or successors to Indian allottees who share the same seniority date.[23] See also *United States v. Alexander*, 131 F.2d 359 (9th Cir. 1942) (same holding with respect to Flathead Reservation).

The district court's erroneous water allocation standard would have required the BIA, as the irrigation project manager, to treat all Reservation water rights, whatever their origin or use, as equivalent in priority. The Ninth Circuit concluded that such an approach conflicts with the doctrine of Indian reserved water rights, *Winters v. United States*, 207 U.S. 564 (1908), and the western water law doctrine of prior appropriation, see, e.g., *Morris v. Bean*, 146 F. 423 (C.C.D. Mont. 1906) ("first in time is strongest in right").[24] The appeals court instructed the lower court that any interim water management strategy at the irrigation project must comport with

---

[23] Thus, by definition, this water allocation standard does not apply to water appurtenant to surplus or unallotted lands on the Reservation, such as homesteaded lands. Because such water rights are acquired under the prior appropriation doctrine, and not the reserved water rights doctrine, their priority date would be junior to that of water serving allotted lands. See *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

[24] 832 F.2d at 1132 (Pet. App. A-68). The Petitioner acknowledges that a water right priority date is a most valuable property right. *General Agriculture Corp. v. Moore*, 166 Mont. 510, 534 P.2d 859, 863 (1975). (Pet. at 17).

federal water law and, consequently, cannot turn a blind eye to salient priority date considerations such as the Tribes' aboriginal fishing right.[25]

Now that the appellate court has rejected the argument that the Tribes' fishery water right should be shared with the irrigators,[26] the Petitioner argues against the federal forum it invoked in the first instance on the grounds that the court of appeals ruling conflicts with

---

25 The appeals court recognized the strength of the Tribes' claim to an aboriginal fishing right and took particular notice of the express text of the 1855 Treaty of Hellgate wherein the Tribes' reserved the "exclusive right of taking fish in all the streams running through or bordering said reservation. . . ." (Pet. App. A-67). The appeals court, referring to its decision in *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982), observed that "we have stated elsewhere that one of the Tribes was heavily dependent on fishing the area when the Treaty of Hellgate was signed." 832 F.2d at 1130 (Pet. App. A-68). See also *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984) (aboriginal fishing water right found under similar facts and similar treaty language); *Montana v. Confederated Salish and Kootenai Tribes*, — Mont. —, 712 P.2d 754, 764 (1985) (recognizing aboriginal right where the preexisting tribal use is confirmed by treaty); *State v. McClure*, 127 Mont. 534, 268 P.2d 624, 632 (1954) ("They [the Confederated Salish and Kootenai Tribes] had always exercised their right to hunt and fish thereon from time immemorial. It was their ancestral home. The treaty confirmed their ownership and their rights. . . . These rights have never passed from the Indians to the people generally, nor to the State, nor to the Federal Govenrment."); *United States v. Winans*, 198 U.S. 371, 381 (1905) ("The treaty is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

26 The Petitioner had urged the district court to effect an "equitable" sharing of the Tribes' aboriginal fishing water right. *See, e.g.*, Plaintiff's August 27, 1986 Brief, at 34 (CR 47).

the McCarran Amendment and will result in "chaos." Pet. at 13.

Petitioner's argument is misplaced for several reasons. First and foremost, the Petitioner incorrectly characterizes the court of appeals decision as "mandating" that the district court adjudicate the priority and quantification of the Tribes' rights. The decision plainly contains no such mandate, neither explicitly nor implicitly. To the contrary, the Ninth Circuit panel simply reversed the lower court and "remanded for such proceedings as may be appropriate and consistent with this opinion." 832 F.2d at 1132 (Pet. App. A-70). Thus the underlying premise of the Petition for Writ of Certiorari is based on an erroneous reading of the appeals court opinion.

The BIA's 1986 interim operating strategy for its irrigation project is simply not a permanent quantification of water rights. It does not create, vest nor permanently adjudicate anyone's water rights. It had a very brief life: less than fifteen weeks.[27] The operating strategy simply prevented the irrigation project from destroying the treaty-reserved fishery until such time as the water rights are permanently quantified. The BIA's 1986 interim plan to leave some water in the streams and reservoirs for fish implemented the principle established in the Tribes' 1985 lawsuit: the irrigation project could no longer "suck dry the streams of the Flathead Reservation in derogation of tribal treaty rights." *Joint Board of Control v. United States*, 646 F. Supp. at 426 (Pet. App. A-60). The BIA, the district court, and the court of appeals were each careful to point out that they were not

---

[27] See note 17, *supra*.

engaging in, and had no intention of engaging in, the permanent quantification of water rights on the Flathead Indian Reservation.[28]

At all times pertinent to this case the Tribes and State of Montana have been actively engaged in compact negotiations pursuant to state law which favors and encourages negotiated settlement of Indian and federal reserved water rights. §§ 85-2-701 to 85-2-705 MCA. While the Tribes are engaged in formal negotiations with the Montana Reserved Water Rights Compact Commission, all proceedings to adjudicate tribally-reserved waters are suspended. § 85-2-217 MCA. These negotiations are ongoing and could continue to mid-1993 as a result of the 1987 Montana Legislature's extension of the compact negotiating time frame. *See* § 85-2-702(3) MCA (App. 14).

For these reasons the Petitioner's allegation of looming conflict between the State water adjudication system and the court of appeals opinion is illusory. The compact negotiations between the Tribes and the State continue unfettered. The Ninth Circuit opinion adheres to the guidance set forth in *San Carlos*. *See* discussion, *supra*, at 10-11. In sum, the court of appeals opinion is not disruptive to Montana's adjudication of water rights on the Flathead Reservation because (1) the opinion does not mandate the federal district court or the BIA to quantify, (2) the BIA's interim operating strategy is not a permanent quantification, and (3) state water adjudication on the Reservation is dormant pending the outcome of the ongoing compact negotiations.

---

[28] See discussion *supra* at 9 (BIA), at 11 (district court) and, *infra*, at 20-21 (court of appeals).

Furthermore, this unique and fact-bound case does not warrant review by this Court because the issue is not ripe in light of the Ninth Circuit remand to the district court. Because of the speculative nature of the effect of the remand, and the lack of a sufficient record in the absence of such a remand, the case does not provide a suitable occasion for this Court's review.

The Petitioner claims a violation of due process based on Project regulations found in 25 C.F.R. Part 171 (Pet. at 21).[29] The appeals court properly recognized that the irrigators' right to consultation pertained only to the "available irrigation water supply" (25 C.F.R. § 171.6(a)) (App. 11) and not to the Tribes' treaty-reserved fishery water right. The appeals court reasoned that no consultation with the Joint Board is required to preserve the fishery; therefore, no due process consideration was implicated. 832 F.2d at 1132 (Pet. App. A-69). The reasoning is sound.

In any event, there was extensive consultation between the BIA and the Joint Board.[30] The BIA attempted

---

[29] Petitioner also alleges a taking without due process of a valuable property right—the irrigators' water rights that are purported to have arisen out of certain Acts of Congress and actions of the Secretary of the Interior. For example, Petitioner alleges that the Secretary issued "secretarial water rights" to non-Indian irrigators, an allegation the Tribes dispute. (Pet. at 3). No evidentiary record, however, has been developed in the lower courts to support this or any other claim to water rights by irrigators. The repayment contracts the Petitioner cites (Pet. at 4, n. 4) are likewise not in evidence in the lower courts.

[30] *See* Affidavit of Bernard Burnham (Ex. B to U.S. Brief; CR 39).

to include the Joint Board in the interim instream flow planning process from its inception on October 31, 1985.[31] The BIA requested the Joint Board to make its technical staff, if any, available to participate in the field studies but the Joint Board declined to do so.[32] The Joint Board failed to hire any technical staff until approximately June 9, 1986, months after the commencement of the irrigation season and fully seven months after the BIA requested its participation in the process.[33] Contrary to the Joint Board's suggestion, the BIA did not rely exclusively upon BIA and tribal input in reaching the 1986 flow and pool figures. *See* Affidavit of Bernard Burnham (Ex. B to U.S. Brief; CR 39). In fact, the Tribes refused to sign an "agreement" proposed by the BIA relative to the 1986 flows. 832 F.2d at 1129 n.1 (Pet. App. A-64).

The Joint Board's due process analysis hinges on the false premise that a permanent *de facto* quantification of water rights has taken place. This is not the case. The court of appeals concluded:

> The reluctance of the district court to render a final adjudication of water rights in the [FIIP] is quite understandable. We do not suggest that the court is

---

31 Testimony of Bernard Burnham (Tr., Vol. 3, at 8-9) (App. 20-22).

32 *Id.* at 17 (App. 22).

33 Testimony of Michael McDowell, Joint Board Biologist (Tr., Vol. 2, at 97) (App. 18). In fact, at the time of the preliminary injunction hearing the Joint Board biologist still had no scientific data to provide to the BIA or to the district court. *Id.* at 98-99 (App. 18-19).

> required to make any such general adjudication or quantification in the course of these proceedings.

832 F.2d at 1132 (Pet. App. A-70). Just as the Ninth Circuit opinion does not direct the district court to quantify Reservation water rights, neither does it "mandate" that the BIA do so. The remand is to the district court for such further proceedings as the district court deems appropriate. 832 F.2d at 1132 (Pet. App. A-70). Thus, the due process question presented by the Petitioner (Pet. at i) is likewise premised on an erroneous reading of the court of appeals opinion.

It is clear that senior water rights prevail to their fullest extent over junior claims. A junior claimant may not invoke a takings argument simply because his claim must give way to a senior right. The court of appeals correctly noted that this is "one of the fundamental principles of the appropriative system of water rights. See e.g., *Morris v. Bean,* 146 F. 423 (C C.D. Mont. 1906)(Montana water law requires that senior rights be fully protected, even though more economic uses could be made by junior appropriators)." 832 F.2d at 1132 (Pet. App. A-68).

Finally, further consideration of the Petitioner's due process allegation is inadvisable in light of the fact that the lower court record is undeveloped on the nature of the rights involved because the district court precluded such proof. This Court has consistently recognized the importance of a developed factual record in cases involving the nature of litigants' property interests:

> Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, [cite omitted] we have found it particularly important in takings cases to

> adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." [cite omitted] In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation Act of 1977 . . . was "premature," 452 U.S. at 296, n. 37, and "not ripe for judicial resolution," *Id.*, at 297, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining.

Pennell et al. v. City of San Jose, et al., — U.S. —, 56 U.S.L.W. 4168, 4171 (February 24, 1988). For these reasons the Petitioner's allegation of a due process violation lacks merit.

———o———

CONCLUSION

For the foregoing reasons, the Confederated Salish and Kootenai Tribes respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals from the Ninth Circuit be denied.

Respectfully submitted,

PATRICK L. SMITH
JOHN B. CARTER
DANIEL F. DECKER
CONFEDERATED SALISH
AND KOOTENAI TRIBAL
LEGAL DEPARTMENT
P.O. Box 278
Pablo, Montana 59855
(406) 675-2700

JAMES H. GOETZ
GOETZ, MADDEN & DUNN, P.C.
35 North Grand
Bozeman, Montana 59715
(406) 587-0618

Attorneys for Confederated Salish and Kootenai Tribes

April 1988

APPENDIX TABLE OF CONTENTS

Treaty of Hellgate, July 16, 1855, 12 Stat. 975 ..... App. 1

Act of February 8, 1887, § 7, 24 Stat. 390 ..... App. 10

25 C.F.R. § 171.6(a) ..... App. 11

Section 85-2-217, Montana Code Annotated ..... App. 12

Section 85-2-701, Montana Code Annotated ..... App. 13

Section 85-2-702, Montana Code Annotated ..... App. 13

Section 85-2-703, Montana Code Annotated ..... App. 14

Section 85-2-704, Montana Code Annotated ..... App. 15

Section 85-2-705, Montana Code Annotated ..... App. 15

PORTIONS OF THE RECORD:

Transcript of Proceedings ..... App. 16

Vol. 1 of 3, pp. 149-50 ..... App. 17

Vol. 2 of 3, pp. 97-99, 115-116 ..... App. 18

Vol. 3 of 3, pp. 8-9, 17, 124-125, 134-135 ..... App. 20

JULY 16, 1855 TREATY OF HELLGATE, RATIFIED BY UNITED STATES SENATE ON MARCH 8, 1859, 12 STAT. 975

Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead Nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, head-men, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognize Victor as said head chief.

ARTICLE 1. The said confederated tribe of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flatbow or Kootenay River and Clarke's Fork, thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°,) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeurd'Alene Rivers, thence

southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the headwaters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

ARTICLE 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters floiwng into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse Prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-in-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided*, That if necessary for the public convenience roads may be run through the said res-

ervation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time

to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and plough-maker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will

be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms, and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The United States further agree to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by

the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading-post on the Pru-in River by the servants of that company.

ARTICLE 11. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo Fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be opened to settlement until such examination is had and the decision of the President made known.

ARTICLE 12. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens, [L.S.]

Governor and Superintendent Indian Affairs W.T.

Victor, head chief of the Flathead Nation, his x mark. [L. S.]
Alexander, chief of the Upper Pendi d'Areilles, his x mark. [L. S.]
Michelle, chief of the Kootenays, his x mark. [L. S.]
Ambrose, his x mark. [L. S.]
Pah-soh, his x mark. [L. S.]
Bear Track, his x mark. [L. S.]
Adolphe, his x mark. [L. S.]
Thunder, his x mark. [L. S.]
James Doty, secretary.
R. H. Lansdale, Indian Agent.
W. H. Tappan, sub Indian Agent.

Big Canoe, his x mark. [L. S.]
Kootel Chah, his x mark. [L. S.]
Paul, his x mark. [L. S.]
Andrew, his x mark. [L. S.]
Michelle, his x mark. [L. S.]
Battiste, his x mark. [L. S.]

Kootenays.

Gun Flint, his x mark. [L. S.]
Little Michelle, his x mark. [L. S.]
Paul See, his x mark. [L. S.]
Moses, his x mark. [L. S.]
Henry R. Crosire,
Gustavus Sohon, Flathead Interpreter.
A. J. Hoecken, sp. mis.
William Craig.

SECTION 7 OF THE GENERAL ALLOTMENT ACT (DAWES), ACT OF FEBRUARY 8, 1887, CH. 119, 24 STAT. 390, CODIFIED AT 25 U.S.C. § 381

25 U.S.C. § 381. *Irrigation lands; regulation of use of water*

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

EXCERPT OF PROJECT REGULATIONS

25 C.F.R. § 171.6 *Distribution and apportionment of water.*

(a) The Officer-in-Charge will establish the method of and procedures for the delivery and distribution of the available irrigation water supply. He will endeavor to apportion the water at all times on a fair and equitable basis between all project water users entitled to the receipt of irrigation water.

* * *

85-2-217. *Suspension of adjudication.* While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended. This suspension shall be effective until July 1, 1993, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1993, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section.

Part 7

Indian and Federal Water Rights

85-2-701. *Legislative intent.* (1) Because the water and water rights within each water division are interre-

lated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature that the attorney general's petition required in 85-2-211 include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.

(2) To the maximum extent possible, the reserved water rights compact commission established under 2-15-212 should make the negotiation of water rights claimed by the federal government or Indian tribes in or affecting the basins identified by 85-2-218 its highest priority.

85-2-702. *Negotiation with Indian tribes.* (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation

of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body, and approval by the appropriate federal authority.

(3) Upon its ratification by the Montana legislature and the tribe, the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration. However, if approval of the state legislature and tribe has not been accomplished by July 1, 1993, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings.

85-2-703. *Negotiations with federal government.* The compact commission may also enter into separate negotiations with the federal government for the conclusion of

compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes.

85-2-704. *Termination of negotiations.* (1) The commission or any negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection (1), they may be reopened only by mutual agreement of the parties.

85-2-705. *Status reports to chief water judge.* (1) The Montana reserved water rights compact commission must submit to the chief water judge, appointed pursuant to 3-7-221, a report on the status of its negotiations on July 1, 1985, and every 6 months thereafter.

(2) Each report must state which Indian tribes and federal agencies are engaged in negotiations, whether any negotiations with Indian tribes or federal agencies have been terminated, and the progress of negotiations on a tribe-by-tribe and agency-by-agency basis. The report must be made available to the public.

In The United States District Court
For the District of Montana
Missoula Division

* * * * * * *

The Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts,

Plaintiff,

v.

The United States of America; The United States Department of the Interior; The Honorable Donald Hodel, Secretary of the Interior; The Bureau of Indian Affairs, an agency within the Department of the Interior Stanley Speaks, Director, Portland Area Office, Bureau of Indian Affairs; and the Flathead Irrigation and Power Project, an agency within the Bureau of Indian Affairs,

Defendants,

and

The Confederated Salish and Kootenai Tribes of the Flathead Reservation,

Intervenor-Defendant.

Cause No. CV-86-156-M-CCL

App. 17

Excerpts from

TRANSCRIPT OF PROCEEDINGS

VOLUME 1, 2 & 3

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT COURT JUDGE
HELENA, MONTANA

August 25, 26, and 28, 1986

* * *

TESTIMONY OF WILLIAM L. SLACK

VOLUME 1

(p. 149) Q Okay. You said historically, based on just hearsay around the project from water commissioners, the K Canal—there's about a—10 cfs below the K Canal passed through of water?

(p. 150) A That's correct.

Q Okay. And that's simply because there's a leakage at the K Canal Diversion, isn't it?

A Simply because of the leakage, we don't traditionally try to stop—

Q But you're never consciously, until the injunction last year, tried to release water; you just didn't try to stop the leaks?

A That's correct.

Q And with that 10 cfs leak, there have been periods when the Jocko below K Canal has historically been dewatered for a couple miles; is that true?

A I've heard that.

* * *

TESTIMONY OF MICHAEL McDOWELL

VOLUME 2

(p. 97) Q Okay. Now, we've asked, of course, in discovery for the results, and it's my understanding that you haven't finished your studies?

A No. The studies are not complete.

Q Okay. And so would it be the case that the results of your studies were not available on June 26 when the biologists met to select inflection points

A No. I was in the field at that time initiating field studies.

Q Initiating the field studies?

A I had started about a week and a half before then, but I was engaged in field studies at that time.

Q So at that date you had only had about a week (p. 98) and a half worth of work under your belt?

A That's correct.

Q Okay. And the reason I'm interested in that is had you been at the June 26 meeting, you would not have been in a position to offer much information based on your IFIM studies at that meeting; you would agree with that?

A No. That's correct.

Q And, similarly, on July 10, when Mr. Speaks in the Portland area office issued the first proposal to—proposed agreement to set flows by, then you'd been in the field another 14 days perhaps?

A That's correct.

Q And you would not have had much in the way of results to offer at that point from—based on your IFIM?

A No. The fieldwork was still in progress.

Q And, likewise, on July 18 when Mr. Brooks was—or 17—in that area—when they were directed to implement those instream flows, you wouldn't have much to offer from your IFIM?

A Again, the fieldwork was in progress.

Q And the same on August 6 when we had the temporary restraining order matter before this Court—you wouldn't have much to offer then?

(p. 99) A There were no results from the study at that point.

Q And, indeed, the affidavit you offered—or the counsel for Joint Board offered—had no incorporation or reference other than to the fact that you were doing the IFIM—didn't incorporate any results at that time?

A That's correct.

* * *

(p. 115) Q Well, let's assume that they didn't have much of that work done by the spring of '86. And given the fact that we needed some flow figures for the 1986 low

water period, then under those constraints, it would not have—it was not unreasonable for them to have selected the wetted perimeter method, was it?

A The wetted perimeter method certainly allowed them to derive data on which they could base recommendations within the time frame that they had.

Q Professional recommendations — professionally justifiable under the constraints, given the constraints?

(p. 116) A It was certainly—the study was acceptably done.

* * *

TESTIMONY OF BERNARD L. BURNHAM

VOLUME 3

(p. 8) Q (By Mr. Brooks) Were you involved with the development of the 1986 interim flow plan for the Flathead Indian—or Flathead Irrigation project?

A Yes, I was.

Q What's the nature of the involvement with that plan?

A Primarily, coordination role of the BIA area office activity as it related to the development of that plan.

Q And tell us how and when planning efforts were initiated for the '86 plan.

A Out of the stipulated agreement that was developed in 1985—August of 1985—one of the stipulations in that agreement required the bureau to initiate water con-

servation management planning. And I believe it was in September of '85 that we began to work on some of the planning effort that would extend over into the operation season for '86.

Q Did you contact the Joint Board and the Tribes (p. 9) in September of '85?

A Yes. After telephone communications, and so forth, subsequent to the '85 stipulated agreement, we in the area office put together a task outline as we perceived how the planning would take place and submitted that in September for review by both the Confederated Tribes and the Joint Board.

Q Did you meet with the Tribes and the Joint Board to discuss the task outline and the plan?

A Yes, we did. We met at the end of October.

Q Did you meet with them together or separately?

A We met with them separately.

Q Did you—had you solicited written comments on your proposals from them?

A Yes. At both meetings with the Joint Board and the Tribes, we requested that they express their input in writing to us.

Q Did you receive input in writing from the Tribes?

A Yes, we did.

Q When did you receive that?

A As I recall, it was in January of '86.

Q Did you receive written input from the Joint Board of Control?

A Yes, we did.

* * *

(p. 17) Q Who did you talk with on the telephone?

A Mr. Mikkelsen.

Q Were they able to participate in the field studies at that time?

A I don't know if—of their capability, as far as being able to, but they were requested to, and the opportunity was therefor them to participate, if they desired and chose to do so.

Q Did they tell you we're not coming, or just not show up, or can you explain a little more clearly?

A I don't know as the invitation was declined, but in terms of the fieldwork that took place, there was no one—no one attended our fieldwork.

Q You made no secret of what and when you were doing the fieldwork?

A No.

* * *

TESTIMONY OF THOMAS BATERIDGE

VOLUME 3

(p. 124) Q Now, Mr. Bateridge, while you're still up here—this is a little disjointed, but I think it would be more efficient.

Did you obtain a photograph from your natural resources—from the Tribes' natural resources department?

And I'm handing you what is marked as Defendant's Exhibit N.

A Yes, I did.

Q And what does that depict generally?

A This photo depicts no water flowing at the Teresa Adams Bridge on the Jocko River on August 5, 1985.

Q And is that normally kept—that photograph—in the course of business in the natural resources department at the Tribes?

A Yes, it is.

(p. 125) MR GOETZ: Your Honor, we have a slide of this that I've marked a print of as Defendants' Exhibit N and would offer that.

(Whereupon, Defendants' Exhibit N was offered into evidence.)

THE COURT: Any objection to this?

MR. HOVEN: No objection, Your Honor.

THE COURT: It will be admitted.

(Whereupon, Defendants' Exhibit N was admitted into evidence.)

Q (By Mr. Goetz) I'll turn on the slide projector. Would you explain when that picture was taken and what it depicts?

A It was taken August 5, 1985, and it depicts a—the channel at the upstream point, I believe, of the Teresa Adams Bridge. And it shows the large cobbles and boul-

ders in that channel. And there is, obviously, no flow in the river at that time.

Q And where is the Teresa Adams Bridge in relation to the K Canal Diversion?

A The bridge is approximately two and a half miles downstream from the K Diversion.

Q Thank you. Would you take your seat, Mr. Bateridge.

A (Witness complied.)

* * *

(p. 134) Q I want to focus your attention on the Jocko (p. 135) River below the K Canal and the estimate by Mr. Slack of 10 to 15 cubic feet per second leakage, historically, through the dam into the river. Does the—has that resulted in a flow in the river—that leakage—throughout the reach below the K Canal?

A No, it has not. As the photo demonstrated, there are times when there is no flow in the Jocko River. The Tribes' water resources program began gauging the Jocko River at the Teresa Adams Bridge in September of 1982. And there were periods in all of the five years—'82, '83, '84, and '85—when there was no flow at the Teresa Adams Bridge.

* * *